80-500

Supreme Court, U. S.
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No.

In the Supreme Court of the United States

October Term, 1980

THE NEWELL BRIDGE & RAILWAY COMPANY,
a West Virginia Corporation,
Petitioner

v.

RICHARD L. DAILEY,
STATE TAX COMMISSIONER OF WEST VIRGINIA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

MARCUS AARON II, ESQUIRE
BERKMAN RUSLANDER POHL
LIEBER & ENGEL
20th Floor, Frick Building
Pittsburgh, Pennsylvania 15219
(412) 392-2030
Attorneys for Petitioner

Of Counsel:
GARY L. GOLDBERG, ESQUIRE
Pittsburgh, Pennsylvania
G. THOMAS BATTLE, ESQUIRE
SPILMAN THOMAS BATTLE & KLOSTERMEYER
Charleston, West Virginia

Financial Press Corporation, Pittsburgh

QUESTIONS PRESENTED

I. May a state, contrary to the decision of this Court in *Complete Auto Transit v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977), impose an unapportioned privilege tax on 100 percent of Petitioner's revenues derived solely from the business of operating an interstate toll bridge?

(Answered in the affirmative by the Court below. Answered in the negative by the Circuit Court of Kanawha County, West Virginia).

II. Should this Court adopt a single definition of interstate commerce and overrule its holding in *Henderson Bridge v. Kentucky*, 166 U.S. 150, 41 L.Ed. 953, 17 S.Ct. 532 (1897), and *Detroit International Bridge v. Corporation Tax Appeal Board*, 294 U.S. 83, 79 L.Ed. 777, 55 S.Ct. 332 (1935) that the business of operating an interstate toll bridge is not itself interstate commerce inasmuch as (A) this Court has subsequently decided that interstate toll bridges are engaged in interstate commerce for purposes other than taxation, and (B) this Court has decided that the business of operating and maintaining other similar fixed facilities is interstate commerce for tax purposes?

(Answered in the negative by the Court below. Answered in the affirmative by the Circuit Court of Kanawha County, West Virginia).

III. Does a business which is purely interstate and has no separate intrastate component meet the nexus test of *Complete Auto Transit v. Brady*?

(Not answered by the Court below. Answered in the negative by the Circuit Court of Kanawha County, West Virginia).

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v.

RICHARD L. DAILEY, STATE TAX
COMMISSIONER OF WEST VIRGINIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, the Newell Bridge & Railway Company, a West Virginia Corporation, respectfully prays that a Writ of Certiorari issue to the Supreme Court of Appeals of West Virginia to review its judgment and opinion entered in this proceeding.

OPINION IN THE COURT BELOW

This petition seeks review of the opinion and judgment of the Supreme Court of Appeals of West Virginia in the case of the *Newell Bridge & Railway Company v. Richard L. Dailey, State Tax Commissioner,* W. Va. , 226 S.E.2d 453 (1980). (App. 1a)

JURISDICTION

The opinion and order of the Supreme Court of Appeals of West Virginia were entered on May 20, 1980. (App. 1a) A timely petition for rehearing was filed, and the order denying rehearing was entered July 2, 1980. (App. 8a) This Petition for Certiorari is filed pursuant to 28 U.S.C. §1257(3) which provides, in pertinent part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> "(3) by Writ of Certiorari... where the validity of a state statute is drawn in question on the grounds of its being repugnant to the Constitution of the United States,...."

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the Commerce Clause of the United States Constitution which provides:

> "The Congress shall have power ... To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;..." U. S.Const. art. I §8.

The statute involved, §2(d) of the Business and Occupation Law of the State of West Virginia, provides in relevant part:

"Upon persons engaging or continuing within the state in any public service . . . there is . . . hereby levied and shall be collected, taxes on account of the business engaged in equal to the gross income of the business multiplied by the respective rates: . . . toll bridge companies, 4.29 percent . . . The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States or between this state and foreign countries." West Virginia Code §11-13-2(d)

STATEMENT OF THE CASE

Introduction

This Petition for Certiorari is brought to seek review of the judgment of the Supreme Court of Appeals of West Virginia which reversed the judgment and order of the Circuit Court of Kanawha County, West Virginia, and reinstated the Administrative Decision of the State Tax Commissioner dated December 8, 1975. The Administrative Decision had affirmed an assessment issued against the Petitioner, The Newell Bridge & Railway Company, for Business and Occupation Tax for the years 1968-1972 in a total amount of $83,051.25 assessed against 100 percent of the gross revenues of the Petitioner which were derived solely from the operation of an interstate toll bridge.

Proceedings Below

On January 22, 1974 the Respondent, Richard L. Dailey, State Tax Commissioner of West Virginia, issued an assessment of Business and Occupation Tax Liability for $83,051.25 together with $24,306.97 in penalties thereon for the years 1968-1972 pursuant to provisions of Chapter 11, Article 13 of the Code of West Virginia of 1931, as amended. On February 21, 1974, Petitioner filed its Petition for Reassessment with the State Tax Commissioner (App. 19a). Pur-

suant to this timely petition, the matter was heard on April 11, 1974 by a hearing examiner in the State Tax Department. On December 8, 1975, the Tax Commissioner issued his Administrative Decision affirming the tax in its entirety but waiving the penalty (App. 12a). On January 7, 1976, Petitioner appealed to the Circuit Court of Kanawha County, West Virginia (App. 34a). On October 5, 1977, the Circuit Court of Kanawha County, West Virginia reversed the Administrative Decision of the Tax Commissioner setting aside the assessment (App 9a). On June 5, 1978, the Tax Commissioner appealed to the Supreme Court of Appeals of West Virginia (App. 37a). The appeal was allowed on September 5, 1978. After argument the Supreme Court of Appeals of West Virginia filed its opinion and order on May 20, 1980 reversing the decision of the Circuit Court of Kanawha County, reinstating the Administrative Decision of the Tax Commissioner (App. 1a). On July 2, 1980, Petitioner's Petition for Rehearing was denied (App. 8a).

Statement of Facts

The Newell Bridge & Railway Company, a West Virginia corporation, taxpayer and Petitioner herein, has its principal office in Newell, Hancock County, West Virginia, and is engaged solely in the business of operating and maintaining a toll bridge across the Ohio River between Newell, West Virginia, and East Liverpool, Ohio.[1] As the boundary of West Virginia extends to the low water mark on the Ohio side of the Ohio River, the bridge, which has been operated as a toll facility since 1905, is physically located two-thirds within the State of West Virginia and one-third in the State of Ohio. The company pays property taxes on that portion of its property in West Virginia, capital stock taxes based on its West Virginia property, and West Virginia income tax. The

[1]All facts in this case were stipulated. The Stipulation appears at App. 31a to 33a inclusive.

toll house for the bridge has always been located outside of West Virginia in East Liverpool, Ohio, where all tolls are collected. From February 1, 1970 to November 11, 1977 tolls were collected only from cars leaving the State of Ohio entering West Virginia. All traffic originating in West Virginia passed toll free. Prior to February, 1970 and subsequent to November 11, 1977, tolls were collected at the toll house in Ohio on cars entering and leaving Ohio so that approximately one-half of the volume of tolls under the two-way toll system was from traffic originating in West Virginia.[2] No tolls whatever have ever been collected in the State of West Virginia.

The bridge carries an equal volume of traffic southbound from Ohio and northbound from West Virginia. It has only one entrance or exit in each state and has no facilities for intrastate traffic. All of the traffic across the bridge, therefore, is interstate and is involved in interstate commerce. That the bridge constitutes an important factor in interstate commerce is evidenced by the fact that after the 1969 closing of the Chester Bridge between Chester, West Virginia and East Liverpool, Ohio, it was the only bridge spanning the Ohio River between Shippingport, Pennsylvania and Weirton, West Virginia.

The State of West Virginia has had a Business and Occupation Tax (formerly designated the Gross Sales Tax) since 1933. Petitioner has filed returns for every year since 1933 reporting the entire amount of tolls as exempt from taxation by reason of the fact that they were derived from interstate commerce. In 1939 and 1966, prior state tax commissioners attempted to impose the tax on the Petitioner, but after preliminary correspondence in which the company claimed exemption by reason of interstate commerce, these attempts

[2]The Stipulation refers only to the facts before and after February 1, 1970. (¶¶6, 7, 12-15, App. 31a, 32a) However, the Court should be aware that as of November 11, 1977, subsequent to the decision in the Circuit Court of Kanawha County, West Virginia, the collection of two-way tolls was resumed.

were abandoned. This proceeding was commenced by an audit on August 10, 1973 leading to the assessment of January 24, 1974 and the Petition for Reassessment on February 21, 1974 (App. 19a) which formally marked the starting point of these proceedings. As noted in the Administrative Decision, the tax is unapportioned and there is no authority in the statute or regulations for apportioning it. (App. 13a)

RAISING OF FEDERAL QUESTION BELOW

The federal question was initially raised before the Tax Commissioner in Section IIID of the Petition for Reassessment asserting that the Business and Occupation Tax created an undue direct burden upon interstate commerce and, therefore, was unconstitutional under the Commerce Clause (App. 23a). The Administrative Decision of the Tax Commissioner ruled that taxpayer's bridge was not itself a part of interstate commerce on the authority of *Henderson Bridge Co. v. Kentucky,* 166 U.S. 150, 41 L.Ed. 953, 17 S.Ct. 532 (1897) and *Detroit International Bridge Co. v. Corporation Tax Appeal Board,* 294 U.S. 83, 79 L.Ed. 777, 55 S.Ct. 232 (1935). (App. 17a)

Petitioner preserved the federal issue in paragraph 2(c) of its Notice of Appeal to the Circuit Court of Kanawha County, West Virginia (App. 34a) which stated:

> "(c) Defendant erroneously included in the measure of the business and occupation tax assessed against the plaintiff gross income derived from interstate commerce, the taxation of which creates an undue burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the Constitution of the United States."

The Circuit Court of Kanawha County, West Virginia in its Order of October 5, 1977 found that the business of the taxpayer was interstate commerce, that the tax in question as applied to Petitioner satisfied three of the four constitutional

tests of *Complete Auto Transit v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977) reh. den. 430 U.S. 976, 52 L.Ed.2d 371, 97 S.Ct. 1669 (1977) in that the tax did not discriminate against interstate commerce, was fairly related to the services rendered by the State, and there was sufficient nexus to impose the tax, but found:

> "5. That the Business and Occupation Tax as applied to this taxpayer failed to satisfy the fourth constitutional test set forth in *Complete Auto Transit v. Brady, supra*, in that the tax is not fairly apportioned in any manner and is, therefore, unconstitutional under the Commerce Clause of the Constitution of the United States, Article I, §8." (App. 10a)

The Tax Commissioner appealed to the Supreme Court of Appeals of West Virginia from this decision introducing a new issue in paragraphs 6 and 7 of his appeal—that a taxpayer must show actual, not just possible, double taxation under the Commerce Clause. (App. 38a)

The Supreme Court of Appeals of West Virginia determined that the exemption section of Section 2(d) of Article 13 of Chapter 11 of the West Virginia Code "is a recitation of the federal Interstate Commerce Clause" (App. 1a) and determined, therefore, that *Henderson Bridge Co. v. Kentucky, supra*, and *Detroit International Bridge Co. v. Corporation Tax Appeal Board, supra*, stood for the proposition that the business of operating a toll bridge was not a business engaged in interstate commerce notwithstanding later decisions of this Court in non-tax cases. In reversing the Circuit Court of Kanawha County, West Virginia, and affirming the tax, the Supreme Court of Appeals of West Virginia stated,

> "So we need not consider the company's contention adopted by the Circuit Court that *Complete Auto Transit v. Brady, supra*, controls. The bridge is not, for our purposes, in interstate commerce." (App. 5a)

ARGUMENT

I. The Imposition Of The Unapportioned West Virginia Business And Occupation Tax On This Petitioner Is Contrary To The Mandate Of This Court In *Complete Auto Transit v. Brady*.

The West Virginia Business and Occupation Tax imposed on this taxpayer pursuant to §11-13-2d of the Code of West Virginia is a tax on the privilege of engaging in business in West Virginia. The Tax Commissioner pointed out in his Administrative Decision of December 18, 1975 that no authority exists either by statute or regulation for the apportionment of the Petitioner's business for Business and Occupation Tax purposes. (App. 13a) Between the date of the Administrative Decision in the case at bar (App. 12a) and the decision of the Circuit Court of Kanawha County, West Virginia (App. 9a), this Court handed down its decision in *Complete Auto Transit v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977), reh. den. 430 U.S. 976, 52 L.Ed.2d 371, 97 S.Ct. 1669 (1977), in which the Court determined that the imposition of privilege taxes on an interstate activity was no longer a *per se* violation of the Commerce Clause. After an exhaustive review of the cases, this Court found that taxes had been sustained in a variety of situations. In reviewing the case law, Mr. Justice Blackmun stated:

> "These decisions . . . have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 30 U.S. at 279.

It is important to note in *Complete Auto Transit, supra,* that all four of these tests were met in that case. Mr. Justice Blackmun's opinion stated:

> "We note again that no claim is made that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided to taxpayer, or that the tax discriminates against the interstate commerce, or that the tax is not fairly apportioned." 430 U.S. at 287.

In expanding upon this theme, Mr. Justice Blackmun examined privilege taxes which focus on the doing of business, addressing the objection that these taxes are easily tailored to single out interstate businesses, subjecting them to effects prohibited by the Commerce Clause and noted:

> "Any tailored tax of this sort creates an increased danger of error in apportionment, of discrimination against interstate commerce, and of lack of relationship of services provided by the State. See Freeman v. Hewit, 329 U.S. at 265-266 n. 13, (concuring opinion). A tailored tax, however accomplished must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce." 430 U.S. at 288 n. 15.

Thus, *Complete Auto Transit, supra,* did not legitimize all state privilege taxes from constitutional challenge. A demonstration that a state lacks a sufficient nexus with the state, or that the tax discriminates against interstate commerce, or that it is unfairly apportioned, or that it is unrelated to services provided by the state could each singly or taken as a whole establish that the tax in question is constitutionally suspect and violative of the Commerce Clause as an undue burden on interstate commerce. When judged from this perspective, it is clear that the Business and Occupation Tax of West Virginia, which is the subject of this appeal, as interpreted and applied by the highest court of the State of West Virginia to this Petitioner is an undue burden on interstate commerce and thus violates the Commerce Clause as it is neither fairly apportioned nor is there sufficient nexus to impose the tax.

Based upon its review of the record, the Circuit Court of Kanawha County, West Virginia, had correctly found in its order of October 5, 1977:

> "2. That the business of the plaintiff taxpayer in operating a toll bridge between Newell, Hancock County, West Virginia, and East Liverpool, Ohio is interstate commerce; (App. 9a)
>
> • • •
>
> "5. That the business and occupation tax as applied to this taxpayer fails to satisfy the fourth constitutional test set forth in *Complete Auto Transit v. Brady, supra,* in that the tax is not fairly apportioned in any manner, and is therefore unconstitutional under the Commerce Clause of the Constitution of the United States, Article I §8.
>
> "6. That this Court has no power to apportion the tax when the legislature has failed to provide an apportionment formula in the statute. *Dravo Contracting Co. v. James,* 114 F.2d 242 (4th Cir. 1940)." (App. 10a)

The Circuit Court set aside the assessment imposed by the Tax Commissioner of West Virginia.

Faced with this decision and the threat to its revenue because of the failure of the legislature to apportion the tax in any manner, the Supreme Court of Appeals of West Virginia sought to avoid the mandate of *Complete Auto Transit v. Brady, supra,* by construing its own statute in such a fashion as to tailor the tax to impose its burden on 100 percent of the purely interstate revenues of Petitioner's business.

The West Virginia tax contains an exception which provides:

> "The measure of this tax shall not include gross income derived from commerce between this State and other states of the United States..." §11-13-2(d) W.Va. Code

which should, under normal rules of statutory construction, have exempted this taxpayer from the payment of the Business and Occupation Tax. However, the Supreme Court of Appeals of West Virginia determined to look to the federal decisions for an interpretation of their own statute. The Court decided that the quoted exemption was a recitation of the federal Interstate Commerce Clause, U.S. Const., art. I, §8, and:

> "Therefore, federal law is an appropriate guide for our analysis, and cases which interpret the federal clause can be relied upon in our examination of our statute's effect. If revenues from bridges are not covered by the federal constitution's commerce clause they are not excepted from the statute." (App. 2a)

The facts of this case are not disputed. Petitioner's business is solely that of operating an interstate toll bridge between Newell, West Virginia, and East Liverpool, Ohio. The bridge is physically located two-thirds within the State of West Virginia and one-third within the State of Ohio. The toll house where all tolls are collected is and always has been located in the State of Ohio. The volume of traffic in each direction across the bridge is approximately equal. It has only one entrance or exit in each state and has no facilities for carrying intrastate traffic. All traffic on the bridge is interstate traffic. (App. 31a)

The Supreme Court of Appeals of West Virginia in the case at bar relied on the cases of *Henderson Bridge Co. v. Kentucky*, 166 U.S. 150, 41 L.Ed. 953, 17 S.Ct. 532 (1897) and *Detroit International Bridge Co. v. Corporation Tax Appeal Board*, 294 U.S. 83, 79 L.Ed. 777, 55 S.Ct. 332 (1935), both cases involving indirect taxes. The taxpayer has argued from the beginning of this case (App. 29a) that cases such as *Walling v. Patton-Tulley Transp. Co.*, 134 F.2d 945 (6th Cir. 1943), *Pederson v. Delaware L. & W. R.R. Co.*, 229 U.S. 146, 57 L.Ed. 1125, 33 S.Ct. 648 (1913), *Overstreet v. North Shore*

Corporation, 318 U.S. 125, 87 L.Ed. 656, 63 S.Ct. 494 (1943) and *National Association of Motor Bus Owners v. Brinegar*, 483 F.2d 1294 (D.C. Cir. 1973), cert. den. 415 U.S. 948, 39 L.Ed.2d 564, 94 S.Ct. 1470 (1974) and cert. den. 415 U.S. 950, 39 L.Ed.2d 567, 94 S.Ct. 1475 (1974), are all cases which have eroded the doctrine of *Henderson Bridge, supra*, and *Detroit Bridge, supra* and make that holding no longer viable. The Supreme Court of Appeals of West Virginia noting that assertions of taxing power by the states were not involved in either *Pederson, supra* or *Overstreet, supra* stated:

> "We might concede that these cases consider railway bridge repair and highway bridge repair an operation to be part of interstate commerce; even that the bridges are "in" interstate commerce to the extent that passage over them is commerce. *Overstreet* is inapposite because it dealt with the FLSA. *Henderson*, based on state taxation powers, is still good law having never been overruled. The revenues derived from the operation of the bridge are not revenues derived from 'commerce from this State and other states'. They are subject to taxation under the Business and Occupation Tax." (App. 5a)

Having thus determined that it is still the view of this Court that a bridge can be in interstate commerce for non-tax purposes and not be in interstate commerce for tax purposes, the Supreme Court of Appeals of West Virginia succeeded in tailoring its tax to apply to the entire revenues of this taxpayer all of which are collected in Ohio, half of which are generated by traffic originating in Ohio, and all of which are derived from interstate traffic. The West Virginia Court decided that it could ignore the mandate of this Court in *Complete Auto Transit, supra*, stating:

> "So we need not consider the Company's contention adopted by the Circuit Court that *Complete Auto Transit v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct.

1076, (1977), controls. The bridge is not, for our purposes, in interstate commerce." (App. 5a, 6a)

The whole philosophy reflected in *Complete Auto Transit v. Brady, supra,* is that interstate commerce, like intrastate business, should pay its way if the tax meets the four-part test set out therein.

This case not only violates the express mandate of this Court in *Complete Auto Transit, supra,* but also later decisions of this Court in *State of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 55 L.Ed.2d 682, 98 S.Ct. 1388 (1978) and *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434,60 L.Ed.2d 336, 99 S.Ct. 1813 (1979). In the *State of Washington, supra,* case, this Court again considered a Business and Occupation Tax that *was* apportioned to activities within the state. The Court specifically contrasted its decision to the unapportioned and invalid tax in *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157, 98 L.Ed. 583, 74 S.Ct. 396 (1954), reh. den. 347 U.S. 931, 98 L.Ed. 1083, 74 S.Ct. 528 (1954), when it said at 435 U.S. 749 n. 18:

> "Today's decision does not question the Michigan-Wisconsin judgment, because Washington apportions its business and occupation tax to activity within the State. *Taxes that are not so apportioned remain vulnerable to Commerce Clause attack.*" (Emphasis supplied).

In *Japan Lines, supra,* this Court, in distinguishing between interstate and international commerce, discussed the apportionment principle of interstate commerce:

> "In order to prevent multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value. The corollary of the apportionment princi-

> ple, of course, is that *no jurisdiction may tax the instrumentality in full.* 'The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile.... Otherwise there would be multiple taxation of interstate operations.'" [citations omitted.] (Emphasis supplied.) 441 U.S. at 447.

Clearly the present effort of the State of West Virginia to impose a privilege tax on 100 percent of the interstate revenue for whatever excuse and whatever alleged justification, is directly contrary to the mandate of the most recent decisions of this Court. The Writ of Certiorari should be granted so that the decision in the Court below may be properly reviewed and set aside.

II. The Holding Of *Henderson Bridge Co. v. Kentucky,* And *Detroit International Bridge Co. v. Corporation Tax Appeal Board,* That The Business Of An Interstate Toll Bridge Is Not Interstate Commerce Should Be Overruled.

The West Virginia Supreme Court of Appeals avoided consideration of the mandate of this Court in *Complete Auto Transit, supra,* and other cases by relying upon the outdated and outmoded principles of *Henderson Bridge Co. v. Kentucky, supra,* and *Detroit International Bridge Co. v. Corporation Tax Appeal Board, supra,* which cases held that interstate toll bridges were merely the instrumentality which enabled others to move in the flow of interstate commerce and that the bridge companies were not themselves transacting interstate business. We respectfully submit that the holdings in these cases were not necessary to the ultimate decision and disposition of those cases at the time they were decided, and that they have been eroded and outmoded by later case law. The time has come that these cases should now be overruled.

At the time this case commenced before the Tax Commissioner of the State of West Virginia, this Court still recognized *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 95 L.Ed. 573, 71 S.Ct. 508 (1951), for the proposition that a privilege tax on a purely interstate business was unconstitutional *per se* under the Commerce Clause. In overruling *Spector Motor Service, supra*, in *Complete Auto Transit v. Brady, supra*, this Court carefully reviewed its prior decisions and the erosion of the *Spector* doctrine that had already occurred and determined that the realities required the adoption of a different philosophical approach. This Court was no longer willing to say that interstate businesses could be exempt *per se* from state taxation, recognizing that interstate businesses were required to pay their way and to assume a fair share of the tax burden. Therefore, this Court held that if each element of the four-part test of *Complete Auto Transit* was met, the state could impose taxes on interstate businesses in the same manner that those taxes were imposed on intrastate business.

The decision in the Court below has pointed out that the decisions of this Court in *Henderson Bridge Co., supra*, and *Detroit International Bridge Co., supra*, which are relics of that earlier effort to permit the states to impose a fair burden of tax, can be used by a state to exact more than its fair share of taxation and indeed to impose an unapportioned tax on revenues derived in large measure in another state.

In the dissent in *Henderson Bridge, supra*, Mr. Justice White stated:

> "I consider it a new and startling doctrine to say that a bridge which is situated in two states, with a sanction of the laws of both, which has been made the post route by act of Congress, is not an instrument of interstate commerce, and that the traffic which goes over such bridge is not such commerce, and that the receipts derived from or charges resulting from such business

are not receipts from interstate commerce business." 166 U.S. at 167.

It is startling to find 83 years later that this "new" doctrine still stands and that toll bridges almost alone among interstate businesses should be ruled to be not in interstate commerce. It is time that this theory should be abandoned.

The *Henderson* case, *supra*, involved a tax on the franchise of a corporation operating an interstate bridge. The court held that the tax was nothing more than a tax on the intangible property of the company in Kentucky. In a later connected case, *Henderson Bridge v. Henderson*, 173 U.S. 592, 43 L.Ed. 823, 19 S.Ct. 553 (1899), the court made it clear that its rationale for upholding the tax was that the tax was based upon the property of the taxpayer within the state and, therefore, found that the tax and the relationship between the tax and the interstate commerce was indirect.

The *Detroit Bridge, supra*, case also involved a privilege tax based upon the corporation's paid up capital and surplus, with the capital and surplus represented by property exclusively used in interstate commerce expressly exempted by the taxing statute and the base upon which the tax was computed. The tax was thus not directly related to the interstate bridge traffic, but rather was based solely on the property of the taxpayer within the taxing state. Hence, the Court was able to find that the relationship between the tax and volume of interstate traffic was merely incidental and indirect.

Upon reflection, it is more important to note that in neither *Henderson, supra*, nor the *Detroit, supra*, cases was the pronouncement that the bridge was not itself part of interstate commerce necessary to the decision. Both cases involved in reality a *de facto* apportionment to property within the state, in contrast to the case at bar which reaches beyond West Virginia's boundaries to tax all revenue

directly. It is clear that if either of these old cases were to be argued today, after *Complete Auto Transit v. Brady, supra,* the taxes would still be allowed, but the unreasonable and artificial distinction as to interstate commerce would not be made.

In its Petition for Reassessment (App. 29a), at the Administrative Hearing (App. 14a) and in the Court below, Petitioner cited the cases of *Walling v. Patton-Tulley Transp. Co., supra, Pederson v. Delaware L. & W. R.R., supra, Overstreet v. North Shore, supra* and *National Association of Motor Bus Owners v. Brinegar, supra,* illustrating the erosion of the *Henderson, supra,* and *Detroit, supra,* cases. The Supreme Court of Appeals of West Virginia (App. 5a) dismissed these considerations by saying that these cases did not involve taxation. The distinction between tax cases and non-tax cases for the determination of what is interstate commerce should have no validity in the case law, nor should any distinction between active or passive participation in interstate commerce. In *Overstreet, supra,* this Court specifically considered and rejected the distinction between those persons engaged in interstate passage and the operator and maintainer of an interstate bridge.

> "As regards itself, respondent says that it is not engaged in interstate commerce, but only in providing facilities which those carrying on commerce may use, and therefore there is not sound basis for treating its maintenance and operational employees as engaged in commerce—rather they only affect commerce. Reliance is placed on Henderson Bridge v. Kentucky, ... and Detroit International Bridge Co. v. Corporation Tax Appeal Board, ... We do not regard these objections as well taken ... The Henderson and Detroit bridge cases, supra, do not affect our conclusions." 318 U.S. at 131-132.

In *Overstreet, supra,* and *Pederson, supra,* this Court specifically recognized that the activity of the taxpayer in providing a means of interstate transportation could be so intimately related to interstate commerce "as to be in practice and in legal contemplation a part of it." *Overstreet, supra,* 318 U.S. at 129 and *Pederson, supra,* 229 U.S. at 151-152.

In *Overstreet,* the taxpayer maintained and repaired an interstate road and bridge, collected tolls and raised and lowered a draw bridge to allow interstate traffic to pass. In the instant case, Petitioner, Newell Bridge & Railway Company, collects tolls and both maintains and repairs its bridge in order to allow interstate traffic to pass. Petitioner's activities in providing a means of interstate transportation must therefore be viewed as being so intimately related to interstate commerce "as to be in practice and legal contemplation a part of it" on the rationale of *Overstreet* and *Pederson, supra.*

As early as 1943, in *Walling v. Patton-Tulley Transp. Co., supra,* Judge Simons of the Sixth Circuit in deciding a case under the Fair Labor Standards Act commented:

> "The work of keeping tracks and bridges used by interstate commerce in a proper state of repair, is so closely related to such commerce as to be in practice and in legal contemplation a part of it." 134 F.2d at 946.

But more important in discussing the defendant's reliance upon *Henderson Bridge, supra* and *Detroit Bridge, supra,* Judge Simons stated:

> "That the Detroit Bridge cases could have been similarly decided upon other grounds, perhaps is now clear, and we are relieved of the difficulty of trying to distinguish in respect to interstate commerce between maintenance of the instrumentalities by which commerce is moved and the maintenance of the highway

> over which it moves, a difficulty enhanced by recent history of which we may take judicial notice, since the international bridge and tunnel, likewise but a highway of foreign commerce, have now rendered obsolescent the facilities of the long-existent ferry company which was the carrier of the same commerce." 134 F.2d at 945

To emphasize the maintenance function of Petitioner taxpayer's activities with respect to maintaining the flow of interstate commerce, one only has to look at two related examples. No one would argue that the maintenance failure which allowed the Silver Bridge to collapse into the Ohio River approximately twelve years ago was so remote from the interstate commerce passing over it for that commerce not to be directly and significantly affected by it. A similar dislocation of interstate traffic was caused by the maintenance failure of the Chester, West Virginia, Bridge on May 14, 1969 (App. 31a-32a) causing all traffic exceeding the Newell Bridge's ten ton load limit to detour for seven and one-half years through Weirton, West Virginia, or Shippingport, Pennsylvania.

To give viability to the decision of the Supreme Court of Appeals of West Virginia in the instant case and the assertion therein that *Henderson Bridge*, *supra*, and *Detroit Bridge*, *supra*, are and ought still to be good law, this Court would have to distinguish this fixed facility, a bridge, from other fixed facilities of interstate commerce such as pipelines. In *Michigan-Wisconsin Pipeline Co. v. Calvert*, *supra*, and *Colonial Pipeline v. Traigle*, 421 U.S. 100, 44 L.Ed.2d 1, 95 S.Ct. 1538 (1975), this Court presumed that the business operation of the company through the maintenance and operation of its fixed pipeline was interstate commerce. There is no logical and rational basis for distinguishing between a pipeline and a bridge for purposes of determining what is and what is not interstate commerce.

For all of these reasons, we respectfully submit that the time has come to recognize, with respect to the definition of interstate commerce, that there must be one definition that applies for all purposes. A facility is either in interstate commerce or it is not. In *Complete Auto Transit, supra*, this Court said, with respect to interstate commerce, that it was time to stop the legal hairsplitting and unreal distinctions which had characterized the history of attempts to tax interstate commerce and to apply a clear, straight-forward, four-part test. *Henderson Bridge, supra*, and *Detroit Bridge, supra*, are relics of that legal hairsplitting era which now serve no useful purpose but to permit the State of West Virginia to impose its unapportioned tax in violation of the mandate of this Court in *Complete Auto Transit, supra*. We respectfully submit, therefore, that *Henderson Bridge, supra*, and *Detroit Bridge, supra*, insofar as they hold that the operation of an interstate toll bridge is not in and of itself interstate commerce, should now be overruled.

For this purpose the Writ of Certiorari should be granted.

III. A Business Which Is Purely Interstate And Has No Separate Intrastate Component Fails To Meet The Nexus Test Of *Complete Auto Transit v. Brady*.

The Circuit Court of Kanawha County, West Virginia, stating that the West Virginia Business and Occupation Tax as applied to this Petitioner met three of the four tests of *Complete Auto Transit, supra*, without elaboration found, "There is sufficient nexus to impose the tax." (App. 10a) The argument on nexus was ignored by the Supreme Court of Appeals of West Virginia when it decided that it could ignore the tests of *Complete Auto Transit, supra* (App. 5a).

Given the facts to which the parties stipulated (App. 31a-33a), the only local characteristics of Petitioner's opera-

tions are the presence of two-thirds of the bridge in the State of West Virginia, the maintenance activities which take place within that portion of the bridge and the fact that the Petitioner is a domestic West Virginia corporation. The decision of the Circuit Court of Kanawha County, West Virginia, and the Administrative Decision of the Tax Commissioner ignored the fact that the mere traversing of the West Virginia end of the bridge by interstate traffic does not produce any taxable revenue. All of Petitioner's gross income derives from its out-of-state toll collection activity with respect to interstate commerce represented by the bridge traffic (App. 31a). The maintenance of the two-thirds of the bridge located in West Virginia is directly and necessarily related to Petitioner's continued ability to collect tolls and thereby generate gross income. This local activity is not sufficiently separate and distinct from the interstate activity here in question to provide a nexus upon which the Business and Occupation Tax could be levied separate and apart from the interstate commerce activity involved. The fact that two-thirds of the bridge is located in West Virginia is not a sufficient nexus upon which to justify this tax. The Tax Commissioner conceded that all of the interstate traffic must necessarily use that portion of the bridge which is located in West Virginia (App. 31a) and that the maintenance and operation of the bridge is essential to the continued passage of interstate commerce. See, *Overstreet v. North Shore Corporation, supra*. While the bridge itself is obviously stationary, all of the revenues which form the tax base upon which West Virginia assessed the tax were collected outside of West Virginia in Ohio (App. 31a). By the same token, the revenues which the State seeks to tax are generated as a result of activity which even the Tax Commissioner concedes to be exclusively interstate commerce activity, to-wit traffic originating in or destined for Ohio (App. 17a).[3]

[3]For 1968, 1969 and January of 1970, only one-half of the revenue producing traffic originated in Ohio. Between February 1, 1970 and *(continued)*

In his Administrative Decision, the Commissioner determined that the existence of two-thirds of the bridge in West Virginia as well as the location of Petitioner's principal office at Newell, West Virginia, constituted a sufficient nexus for the imposition of the Business and Occupation Tax without any requirement that the toll facility be located in West Virginia (App. 17a). The Circuit Court of Kanawha County, West Virginia, apparently agreed (App. 10a). We respectfully submit that this determination ignores this Court's description of an interstate business with taxable intrastate operations.

In *Cooney v. Mountain State Telephone and Telegraph Co.*, 294 U.S. 384, 79 L.Ed. 934, 55 S.Ct. 477 (1935), this Court noted that where a tax is exacted from one doing both an interstate and intrastate business, it must appear that the tax is imposed solely upon account of the latter and that the amount exacted is not increased because of the interstate business done, and that one who is taxed could discontinue intrastate business without also withdrawing from the interstate business. 294 U.S. at 393.

None of these qualifications are met in the instant case. Rather than being based solely on intrastate activity, taxes are imposed on the interstate activities of Ohio toll collections and maintenance in both Ohio and West Virginia of the interstate bridge. The amount exacted, furthermore, is directly increased by the interstate business done. That is, gross revenues are dependent solely on the volume of the interstate bridge traffic. Finally, Petitioner could not discontinue use of the part of the bridge located in West Virginia without the immediate cessation of all business whatsoever. The key to the argument of nexus is the existence of a separate local aspect of the business. Applying this rule to the

November 11, 1977 all the revenue producing traffic originated in Ohio. Since November 11, 1977, only one-half the revenue producing traffic has originated there.

Petitioner's business, since there is no separate intrastate or local business, only purely interstate business, the tax would continue to be invalid. The fact that the taxpayer is a West Virginia corporation does not alter the character of the business or make the invalid tax valid. The domicile of the corporation would only apply to another of the *Complete Auto, supra*, tests, whether the tax is fairly related to the services rendered by the state but not to the question of nexus.

From the foregoing, it is clear that the Petitioner has no separate local activities upon which the Business and Occupation Tax may be levied. The Petitioner's local activities do not produce any revenue but are supportive of, essential to and inseparable from its overall operations which are solely interstate in nature. Where no separation between interstate and intrastate commerce is possible and hence a measure by gross receipts would fall on the interstate commerce as well, an undue burden on interstate commerce is created because a similar exaction might be levied by the other states in which the taxpayer operates. See *Gwin, White & Prince v. Henneford*, 305 U.S. 434, 83 L.Ed. 272, 59 S.Ct. 325 (1939) and *Japan Line Ltd. v. County of Los Angeles, supra.*

Furthermore, a taxing state may not point to certain peculiar local incidents as establishing a sufficient nexus for a tax in order to justify the imposition thereof. As noted in *Memphis Natural Gas. v. Stone*, 335 U.S. 80, 92 L.Ed. 1832, 68 S.Ct. 1475 (1948):

> "The choice of the local incident for the tax, without more, is not enough. There are always convenient local incidents in every interstate operation... The incident selected should be one that does not lend itself to the repeated exactions in other states." 335 U.S. at 87.

Noting the presence of two-thirds of the bridge in West Virginia as a nexus for taxation, the Tax Commissioner in his

Administrative Decision seized on just such a local incident. He had concluded that every vehicle that uses the bridge, whether coming from Ohio or West Virginia, must use that portion of Petitioner's bridge located in West Virginia and thus that every passage of a vehicle is an activity that relates to West Virginia. This result ignores the equally obvious fact that every vehicle passing over the bridge must also use the Ohio portion of the bridge thus relating every single trip to both states. It is elementary that if this local incident enables West Virginia to tax all of Petitioner's gross receipts from interstate tolls, the State of Ohio could do likewise. That the resulting double taxation would constitute an impermissible burden on interstate commerce is beyond dispute, as it was precisely this problem of multiple taxation which the Commerce Clause was designed to eliminate. See, e.g. *Michigan-Wisconsin Pipeline Co. v. Calvert, supra*, 347 U.S. at 166.

Petitioner's local activities are inseparable from the interstate activity and are essential to interstate commerce. Accordingly, Petitioner's activities are not properly subject to a state privilege tax. *Ozark Pipeline v. Monier*, 266 U.S. 555, 69 L.Ed. 439, 45 S.Ct. 184 (1925).

For this additional reason the Writ of Certiorari should be granted.

CONCLUSION

As this Petition has demonstrated, the Supreme Court of Appeals of West Virginia has rendered a decision in the Court below which imposes an unapportioned privilege tax on the entire gross receipts of the purely interstate business of Petitioner in violation of the letter and spirit of this Court's mandate in *Complete Auto Transit v. Brady, supra.*

This Court's decision in *Henderson Bridge v. Kentucky, supra*, and *Detroit International Bridge Co. v. Corporation Tax Appeal Board, supra*, that the operation of an interstate

bridge is not interstate commerce is inconsistent with later decisions of this Court particularly in *Pederson v. Delaware L. & W. R.R. Co., supra,* and *Overstreet v. North Shore Corporation, supra,* both of which hold that the operation of an interstate bridge is in interstate commerce.

Henderson Bridge, supra, and *Detroit Bridge, supra,* are outdated, inconsistent with current law, unnecessary and lead to an unjust and unconstitutional result in the case at bar. The time has come that holdings of *Henderson Bridge, supra,* and *Detroit Bridge, supra,* should now be overruled.

In addition to lack of apportionment, the imposition of the West Virginia Business and Occupation Tax on this Petitioner fails to meet the nexus test of *Complete Auto Transit v. Brady, supra.*

For all of these reasons, we respectfully request that the Petition for Certiorari be granted so that this Court can properly review the decision of the Supreme Court of Appeals of West Virginia in the case at bar.

Respectfully submitted,

MARCUS AARON II
BERKMAN RUSLANDER POHL
LIEBER & ENGEL
20th Floor Frick Building
Pittsburgh, Pennsylvania 15219
Attorneys for Petitioner

of Counsel
GARY L. GOLDBERG
Pittsburgh, Pennsylvania
G. THOMAS BATTLE
SPILMAN, THOMAS, BATTLE
& KLOSTERMEYER
Charleston, West Virginia

APPENDIX

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14250

THE NEWELL BRIDGE & RAILWAY CO.

v.

RICHARD L. DAILEY, STATE TAX COMMISSIONER

OPINION

Harshbarger, Justice: **Filed May 20, 1980**

Our State Tax Commissioner assessed the bridge company $83,051.25 in unpaid Business and Occupation taxes, and the taxpayer, appealing to the Kanawha County Circuit Court, won reversal. The Commissioner appealed to us.

The company's bridge spans the Ohio River between Newell, West Virginia and East Liverpool, Ohio. Two-thirds of the bridge is in West Virginia (we own the river to its low-water mark on the Ohio shore), but the tollbooth is on the Ohio side. All traffic upon the bridge is interstate.

The company is a West Virginia corporation, pays West Virginia property, capital stock and income taxes, and has regularly filed West Virginia Business and Occupation tax returns reporting all tolls collected and claiming them exempt because they were received from interstate traffic.

W. Va. Code, 11-13-2, imposes annual privilege taxes against persons (including corporations) measured by values or gross receipts. The rate for toll bridge companies is four and twenty-nine hundredths percent, per Code, 11-13-2d, which section further provides: "The measure of this tax shall not include gross income derived from commerce between this State and other states of the United States. . . ." This sentence is a recitation of the federal Interstate Commerce Clause, U.S. Const. art I, §8: "The Congress shall have

Power...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...." Therefore, the federal law is an appropriate guide for our analysis, and cases which interpret the federal clause can be relied upon in our examination of our statute's effect. If revenues from bridges are not covered by the federal constitution's commerce clause, they are not excepted from the statute.

The Commissioner relied on *Henderson Bridge Co. v. Kentucky*, 166 U.S. 150, 41 L.Ed. 953, 17 S.Ct. 532 (1897), wherein a state tax upon the franchise value of a bridge between Kentucky and Indiana was sustained as not violating the federal constitution's commerce clause.

> Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted.

Four justices dissented, primarily because they considered:

> [I]t [is] a new and startling doctrine to say that a bridge which is situated in two States, with the sanction of the laws of both, which has been made a post route by act of Congress, is not an instrument of interstate commerce, and that the traffic which goes over such bridge is not such commerce, and that the receipts derived from or charges resulting from such business are not receipts derived from interstate commerce business. Pushed to

its legitimate conclusion, this premise deprives the interstate commerce clause of the Constitution of its entire efficacy, and is, I think in direct conflict with the Constitution as interpreted by this court from the foundation of the government.

Henderson Bridge Co. v. Kentucky, supra
166 U.S., at 167
(White, J., dissenting).

They could not reconcile *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204, 14 S.Ct. 1087, 38 L.Ed. 962 (1894), which prohibited Kentucky from actually fixing toll rates to be charged for use of a bridge between Covington and Cincinnati. However, *Covington* clearly stated that local taxation of *instruments* of interstate commerce, in the absence of federal regulations, was permissible, "provided such tax be not laid upon the commerce itself." 154 U.S. at 212. *See Smith v. State*, 64 Wash.2d 323, 391 P.2d 719 (1964); *Shrader v. Steubenville East Liverpool & Beaver Valley Traction Co.*, 84 W.Va. 1, 99 S.E. 207 (1919); *see also Public Service Commission v. Harpers Ferry & Potomac Bridge Co.*, 114 W.Va. 291, 171 S.E. 760 (1933).

Detroit International Bridge Co. v. Corporation Tax Appeal Board, 294 U.S. 83, 79 L.Ed. 777, 55 S.Ct. 332 (1935), was by a unanimous court, and it expressly affirmed *Henderson*. Its thesis was that a corporation does not engage in interstate commerce simply by owning and operating a toll bridge between this country and Canada; therefore, a state privilege tax on the company measured upon paid-up capital and surplus does not violate the Constitution's commerce clause.

This bridge company contends that there has been erosion of the *Henderson* and *Detroit* rule by later cases such as

Pedersen v. D. L. & U. R. R. Co., 229 U.S. 146, 33 S.Ct. 648, 57 L.Ed. 1125 (1913). Damages were sought for personal injuries suffered by a railway employee who, while carrying bolts to a railroad bridge to be used in repairing it, was struck by his employer's passenger train. He brought his claim under the Federal Employers' Liability Act of 1908, and the court found that he could maintain his suit because the act covered employees of carriers engaged in interstate commerce, injured while employed in interstate commerce; and one carrying materials to be used in repairing an instrumentality of such commerce is engaged in commerce.

The company also cites *Overstreet v. North Shore Corporation*, 318 U.S 125, 63 S.Ct. 494, 87 L.Ed. 656 (1943), to support *Pederson*. In *Overstreet*, the Fair Labor Standards Act's application to workers who operated or maintained a tollroad and drawbridge over a navigable waterway, was affirmed; they were engaged in commerce.

> Reliance is placed upon *Henderson Bridge Co. v. Kentucky*, 166 U.S. 150, and *Detroit Bridge Co. v. Tax Board*, 294 U.S. 83, where in sustaining the power of the States of Kentucky and Michigan, respectively, to tax the franchise of domestic corporations operating bridges between Kentucky and Indiana and between Michigan and Canada, it was said that the respective bridge companies were not engaged in interstate or foreign commerce. We do not regard these objections as well taken.
>
> • • •
>
> The *Henderson* and *Detroit* bridge cases, *supra*, do not affect our conclusion. We have pointed out that decisions such as those, dealing with various assertions of state or federal power in the commerce field, are not particularly helpful in determining the scope of the Act.

Kirshbaum Co. v. Walling, supra, pp. 520-21; *Walling v. Jacksonville Paper Co., supra*. But even if we accept the premise of the *Bridge* cases and regard respondent as not engaged in commerce, the result is not changed. The nature of the employer's business is not determinative, because as we have repeatedly said, the application of the Act depends upon the character of the employees' activities. *Kirshbaum Co. v. Walling, supra*, p. 524; *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88; *Walling v. Jacksonville Paper Co., supra*. The fact that respondent may be subject to state taxation does not imply that it is free from federal regulation or that its road and drawbridge are not instrumentalities of interstate commerce.

Overstreet v. North Shore Corporation, supra 318 U.S., at 131, 132.

We agree that assertions of taxing power by states are not involved in either *Pederson* or *Overstreet*. We might concede that these cases consider railway bridge repair and highway bridge repair and operation to be part of interstate commerce; even that the bridges are "in" interstate commerce, to the extent that passage over them is commerce. *Overstreet* is inapposite because it dealt with the FLSA. *Henderson*, based on state taxation powers, is still good law having never been overruled. The operation of a bridge is not interstate commerce. The revenues derived from operation of the bridge are not revenues derived from "commerce between this State and other states". They are subject to taxation under the Business and Occupation Tax.

So we need not consider the company's contention, adopted by the circuit court, that *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977),

controls. The bridge is not, for our purposes, in interstate commerce.

One interesting argument by the company is that a bridge is nothing more than a fixed ferry boat, and so *Gibbons v. Ogden*, 9 Wheat, 1, 218, 6 L.Ed. 23, 75 (1824), and *Gloucester Ferry Co. v. Commonwealth of Pennsylvania*, 114 U.S. 196, 29 L.Ed. 158 (1884), are controlling.

Another comparison was used in *Shrader, supra* 99 S.E., at 212: "One bridges a stream or body of water by a movable surface, the other by a fixed and stationary surface." We disavow that language. A bridge is no more a ferry boat than is a railroad track a locomotive, or a highway an automobile.

A bridge is a surface over which passes traffic, just as rivers or rails or highways are surfaces. The only similarity that bridges have to ferry boats is that they both facilitate river crossings (except, of course, some bridges span dry land).

Reversed.

ORDER

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 20th day of May, 1980, the following order was made and entered, to-wit:

The Newell Bridge & Railway Company, a West Virginia Corporation, Plaintiff Below, Appellee

14250 vs.

Richard L. Dailey, State Tax Commissioner of West Virginia, Defendant Below, Appellant

Upon an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 5th day of October, 1977.

The Court, having maturely considered the transcript of the record herein, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in said judgment. It is therefore considered and ordered by the Court that the judgment of the Circuit Court of Kanawha County rendered on the 5th day of October, 1977, be, and the same is hereby, set aside, reversed and annulled, and that the appellant do recover of and from the appellee her costs about the prosecution of her appeal in this Court in this behalf expended. AND this action is remanded to the Circuit Court of Kanawha County for disposition according to the principles stated in the written opinion aforesaid and further according to law; all of which is ordered to be certified to the Circuit Court of Kanawha County.

• • •

ORDER OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA DENYING REHEARING

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2d day of July, 1980, the following order was made and entered, to-wit:

The Newell Bridge & Railway Company, a West Virginia Corporation, Plaintiff Below, Appellee

14250 vs.

Richard L. Dailey, State Tax Commissioner of West Virginia, Defendant Below, Appellant

The Court having maturely considered the petition for rehearing and reargument filed in the foregoing case is of opinion to, and doth hereby deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: /s/ George W. Singleton
Clerk
Supreme Court of Appeals

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

THE NEWELL BRIDGE & RAILWAY COMPANY
A West Virginia Corporation,
Plaintiff

v.

RICHARD L. DAILEY, State Tax Commissioner of West Virginia,
Defendant

Civil Action No. AP-CA-76-9

ORDER

This matter having come before the Court on appeal from the Administrative Decision of the Tax Commissioner of West Virginia dated December 8, 1975, holding the taxpayer subject to the provisions of the business and occupation tax of West Virginia §2d, Chapter 11, Article 13 of the West Virginia Code, and the Court having considered the briefs and oral arguments of counsel, the Court finds:

1. That the exemption provision of §2d of Chapter 11, Article 13 of the West Virginia Code is an enactment of the Commerce Clause of the United States Constitution;

2. That the business of the plaintiff taxpayer in operating a toll bridge between Newell, Hancock County, West Virginia and East Liverpool, Ohio is interstate commerce;

3. That the gross income of the plaintiff taxpayer from its business of operating an interstate toll bridge is excluded from the business and occupation tax under the express language of §2d which provides "The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States . . . ";

4. That the business and occupation tax as applied to this taxpayer satisfies three of the four constitutional tests set forth in *Complete Auto Transit v. Brady*, U.S. , 51 L.Ed.2d 326 (1977), in that:

(a) The tax does not discriminate against interstate commerce;

(b) The tax is fairly related to the services rendered by the State of West Virginia; and

(c) There is sufficient nexus to impose the tax;

5. That the business and occupation tax as applied to this taxpayer fails to satisfy the fourth constitutional test set forth in *Complete Auto Transit v. Brady, supra*, in that the tax is not fairly apportioned in any manner, and is therefore unconstitutional under the Commerce Clause of the Constitution of the United States, Article I §8.

6. That this Court has no power to apportion the tax when the legislature has failed to provide an apportionment formula in the statute. *Dravo Contracting Co. v. James*, 114 F.2d 242 (4th Cir. 1940).

Therefore, it is ORDERED that the Administrative Decision of the defendant Tax Commissioner of December 8, 1975 at Docket No. 74-075B, File No. 55-0244-285-001, is hereby reversed and the assessment of business and occupa-

tion tax against the plaintiff taxpayer for the years 1968 through 1972 in total amount of $83,051.25 is hereby vacated.

It is FURTHER ORDERED that the lien on the real property of the plaintiff given as security for payment of said tax is hereby vacated.

Dated this 5th day of October, 1977.

ENTER:

.../s/ THOMAS E. MCHUGH....
Judge of the Circuit Court
of Kanawha County

BEFORE THE STATE TAX COMMISSIONER OF WEST VIRGINIA

In the Matter of the Petition of NEWELL BRIDGE & RAILWAY COMPANY Newell, West Virginia 26050	**BUSINESS TAX DIVISION FILE No. 55 0244 285 001 DOCKET # 74-075B**

ADMINISTRATIVE DECISION

Pursuant to a field audit conducted by the auditing section of the Business Tax Division, State Tax Commissioner, Richard L. Dailey, issued an assessment against Newell Bridge & Railway Company on January 22, 1974, for business and occupation tax pursuant to the provisions of Chapter 11, Article 13 of the Code of West Virginia of 1931, as amended. The assessment was for the period 1968 through 1972 for tax in the amount of $83,051.25 with penalty thereon in the amount of $24,306.97 for a total assessed tax and penalty in the amount of $107,358.22.

Taxpayer filed a timely petition for reassessment and the cause was regularly set for hearing after due notice was given to and received by the taxpayer.

The Hearing Examiner, H. William Largent, having determined that all proper notices and documents required by law had been timely filed, the matter came on to be heard at 1:00 p.m., EDT, on the 11th day of April, 1974, in the State Tax Department at Charleston, West Virginia.

Counsel for the State Tax Department established a prima facie case against the taxpayer by introducing into the record the taxpayer's business and occupation tax returns for the years 1968 through 1972 as well as the information and

the results contained in the audit performed by the auditing section of the Business Tax Division. Counsel for the State alleged that in the period 1968 through 1972, taxpayer failed to report as gross income the proceeds from its toll bridge charges. Counsel for the State argued that the statutory authority for the taxation of gross income derived from toll bridge charges is found in Chapter 11, Article 13, Section 2d of the Code of West Virginia of 1931, as amended; wherein the term "toll bridge companies" specifically appears as being a public service business subject to the business and occupation tax. Counsel for the State further argued that the cases of *Henderson Bridge Company v. Kentucky.* 166 U.S. 150 (1897) and *Detroit Bridge Co. v. Tax Board,* 294 U.S. 79 (1935) remain valid authority for the taxation of toll charges. Counsel for the State also argued that no authority exists either by statute or regulation for the apportionment of the toll charges for business and occupation tax purposes. Counsel for the State further argued that the business and occupation tax is not being levied on interstate commerce inasmuch as the persons and vehicles using the bridge are the only elements in the flow of interstate commerce and that the bridge, itself, cannot come under the protection of the Commerce Clause of the Federal Constitution since the toll income is generated from the patrons and vehicles which cross the bridge and not from the bridge per se.

Subsequent to the time of the hearing, counsel for the State submitted by brief arguments to further elaborate his case. Counsel stated in the brief that the case of *Henderson Bridge Company* and *Detroit Bridge Company* have not been overruled by more recent cases on the subject of interstate commerce but, rather, stand for the proposition *(Henderson, supra,* pp. 153, 154; *Detroit, supra,* p. 85) that the bridge companies in question, operated an instrumentality which enables others (those who use the bridge) to move in

the flow of interstate commerce without themselves transacting interstate business. Counsel further stated in the brief that cases cited by the taxpayer, to wit: *Walling v. Patton-Tulley Trans. Co.*, 134 F.2d 945 (1943), *Pedersen v. D. L. & W.R.R. Co.*, 229 U.S. 125 (1913), *Overstreet v. North Shore Corporation*, 318 U.S. 125 (1943) and *National Association of Motor Bus Owners v. Brinegar*, 483 F.2d 1924 (1973) were not on point since the persons and/or corporation associated with each were all *actively generating* the physical motion that constitutes interstate commerce; and thereby were engaged in interstate commerce. These situations can readily be distinguished from the business activity engaged in by the taxpayer; namely, a passive role in relation to interstate commerce (the exaction of toll charges from the persons and corporations which generate the motion of interstate commerce): an activity which does not add motion to the flow of commerce. Counsel also stated in its brief that the taxpayer's gross income from toll charges need not be apportioned since the taxpayer is not engaged in interstate commerce and, therefore, no undue burden needs to be alleviated as was the case in *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508 (1951). Counsel noted in its brief that the location of the toll facility in Ohio has no bearing on taxability since the activity which gives rise to the toll payment is West Virginia based. Counsel further noted in the brief that the State Tax Department is not estopped to collect the business and occupation tax since at no time did any past Tax Commissioner agree that the taxpayer's gross income from toll charges were derived from an interstate business exempt under the Commerce Clause. Counsel in its brief noted that although the 1939 letter from Tax Commissioner James permitted the taxpayer to exempt its income, this action was taken only because the imposition of the tax would have a deliterious effect on the taxpayer's competitive position regarding a free bridge which was in existence

at that time. Counsel also noted that the courts have uniformly held that the doctrine of estoppel is inapplicable not only when the administrative agency simply fails to take any action with regard to a taxpayer, but even when it takes a positive step, such as giving advice or issuing a ruling or regulation. Counsel finally noted that a 1966 memorandum from Tax Department officials reasserted the taxability of the toll bridge income.

The taxpayer presented his argument for relief from the assessment by first stating that the company has never attempted to avoid disclosure of its toll bridge income since all income was reported to the State of West Virginia but deducted on the grounds that it was derived from interstate commerce. Taxpayer stated that the actions of past Tax Commissioners in failing to bring this matter to a conclusion amounts to an acquiescence by silence in support of the taxpayer's claim that gross income derived from toll bridge charges is not subject to the business and occupation tax since it is derived from interstate commerce.

Subsequent to the time of the hearing, counsel for the taxpayer submitted a reply brief in response to the State's brief for the purpose of further elaborating his case. Counsel for the taxpayer in his brief argued that the interstate and intrastate elements of petitioner's operations are not inextricably interwoven so that local activity cannot be separated for the purpose of levying the tax without creating an undue burden on interstate commerce. Counsel for the taxpayer noted in this regard that due to the interstate character of the bridge the taxpayer could not discontinue the intrastate business without also withdrawing from the interstate business; a further test of the inseparability of the taxpayer's interstate activity. Counsel for the taxpayer further noted that the

Henderson and *Detroit Bridge* cases being relied upon by the State to sustain its positions are antiquated and fundamentally different from the case presently under consideration, to wit: both cases involved the taxation of property located within the State's territorial limit and thus not directly related to the interstate bridge traffic. Counsel for the taxpayer argued that the *Henderson* and *Detroit* cases, which were incidentially before past Tax Commissioners when their decision not to pursue this matter were reached, have been eroded by cases such as *Walling v. Patton-Tulley, Pederson v. D.L. & W.R.R. Co., Overstreet v. North Shore Corporation,* and *National Association of Motor Bus Owners v. Brinegar* which extended the umbrella of interstate commerce beyond any distinction of "active" vs. "passive" as a determination of what will or will not be exempted from taxation. Counsel for the taxpayer further stated that apportionment of the business and occupation tax on the basis that certain of the taxpayer's business is intrastate cannot be permitted inasmuch as the intrastate portion cannot be separated from the interstate character of the business. Therefore, it must be concluded that since separation is not possible, then the imposition of the unapportioned tax is invalid as a restraint on interstate commerce *(Spector Motor Service, Inc. v. O'Connor).* Taxpayer's counsel noted that the location of the collection toll booth in Ohio is significant and not immaterial as contended by the State since the tax arises not from the interstate passengers but, rather, is imposed on the revenues produced by petitioner's toll-collecting activity in Ohio. Counsel for the taxpayer further stated that Chapter 11, Article 13, Section 2d of the Code of West Virginia of 1931, as amended, prohibits the taxation of income derived from commerce between the State of West Virginia and other states of the United States; therefore, since petitioner's business is conducted interstate, then no taxation is permitted. Moreover, counsel for the taxpayer

contended that Chapter 11, Article 13, Section 2i of the Code of West Virginia of 1931, as amended, precludes taxation since a portion of the taxpayer's bridge at which the tolls are collected is located outside the State of West Virginia and, therefore, any tax imposed under this section would have to be based upon taxation of this out-of-state activity. In addition, taxpayer's counsel made reference to the fact the penalty should not be imposed in the instant case due to the taxpayer's showing of good faith in that all tax returns were filed and taxes paid thereon which were felt to be due and owing the State of West Virginia. Counsel noted that as to the penalty issue no valid distinction between the Tax Commissioner's vacillations in the *United Fuel Gas* case and the present one can be established inasmuch as the State has in this case not taken a firm position but, rather, vacillated on the subject of whether gross income from toll booth charges were taxable.

After a thorough review of the taxpayer's records, exhibits and oral presentation made at the time of the hearing as well as legal arguments contained in briefs submitted subsequent to the time of the hearing, it has been determined that the taxpayer's toll bridge located between Newell, West Virginia and East Liverpool, Ohio functions only as an avenue on which vehicles and patrons move in the stream of interstate commerce and is not, itself, so interwoven with the movement of that commerce so as to be a part of it. It has further been determined that the West Virginia portion of the bridge (2/3 located in West Virginia) as well as the location of the principal office at Newell, West Virginia constitutes sufficient nexus for the imposition of the business and occupation tax without any requirement that the toll facility need also be located in West Virginia. It has also been determined that the *Henderson Bridge Company* and *Detroit Bridge Company* cases have not been eroded by subsequent court decisions and, therefore, still stand for the

proposition that an instrumentality which enables others to move in the flow of interstate commerce does not, itself, transact interstate business. It has also been determined that cases such as *Walling v. Patton-Tulley Trans. Co., Pederson v. D.L. & W.R.R. Co., Overstreet v. North Shore Corporation* and *National Association of Motor Bus Owners v. Brinegar* involved interstate commerce inasmuch as the principals involved were actively engaging in a physical motion as a part of that commerce and were not situated as is the taxpayer in a passive role of collecting tolls for these who are in the flow of interstate commerce. It has also been determined that apportionment of the taxpayer's gross income from toll charges is not necessary since the bridge in question is not engaging in interstate commerce. It has also been determined that the present Tax Commissioner is not estopped to collect the business and occupation tax since he is not bound by the actions of past Tax Commissioners. It has also been determined that Chapter 11, Article 13, Sections 2b and 2i of the West Virginia Code of 1931, as amended, both have applicability to the present taxpayer since the taxpayer's gross receipts are not derived from interstate commerce but rather from an instrumentality which provides the movement for that commerce. It has finally been determined that the taxpayer showed reasonable cause for waiver of penalty.

WHEREFORE, it is the DECISION of Richard L. Dailey, State Tax Commissioner, that the assessment issued against Newell Bridge & Railway Company for business and occupation tax for the period 1968 through 1972 is affirmed in the amount of $83,051.25 with penalty thereon in the amount of $24,306.97 hereby being waived.

/s/ Richard L. Dailey

RICHARD L. DAILEY
State Tax Commissioner

Date Rendered: 12/8/75

PETITION FOR REASSESSMENT BY THE NEWELL BRIDGE AND RAILWAY COMPANY

I. Nature, Amount, And Assessment Period Of Asserted Tax Liability

A. *Nature of Tax*—Business and Occupation Tax, with penalties, assessed pursuant to provisions of Articles 12A, 13, 15, and 15A of Chapter 11, Code of West Virginia of 1931, as amended:

B. *Amount of Tax and Penalties for Periods of Assessment.*

	PERIOD	TAX	PENALTY	TOTAL
(1)	1968	$ 5,993.36	$ 3,536.08	$ 9,529.44
(2)	1969	13,961.06	6,561.70	20,522.76
(3)	1970	19,483.46	6,819.21	26,302.67
	1-1 to 3-31			
(4)	1971	4,182.63	962.00	5,144.63
	4-1 to 12-31			
(5)	1971	17,421.67	4,006.98	21,428.65
(6)	1972	22,009.07	2,421.00	24,430.07
		$83,051.25	$24,306.97	
			TOTAL AMOUNT	$107,358.22

C. *Date of Assessment and Date of Receipt by Petitioner.*

The assessment was dated January 22, 1974, and was sent by certified mail being received by the Petitioner on January 30, 1974. A copy of the assessment is attached hereto as Exhibit "A".

II. Items Of The Assessment To Which Petitioner Objects.

The Petitioner objects to each and every item of the assessment of tax and penalty, as noted above.

III. Statement Of Facts And Law Upon Which Petitioner Relies In Its Objections.

A. *Statement of Facts.*

The business activity upon which the Business and Occupation Tax has been assessed in this case is activity which involves exclusively interstate commerce. The Newell Bridge and Railway Company, having its principal office in Newell, Hancock County, West Virginia is engaged solely in the business of operating and maintaining a toll bridge across the Ohio River between Newell, West Virginia, and East Liverpool, Ohio. As the boundary of West Virginia extends to the low-water mark on the Ohio side of the Ohio River, two-thirds of the bridge is physically located within the State of West Virginia, and one-third in Ohio. The company pays property taxes on that portion of its property in West Virginia. The toll house is and has always been located in East Liverpool, Ohio, and all tolls are collected there. Since 1969 the tolls have been collected only from cars leaving the State of Ohio, entering West Virginia. Prior to 1969 tolls were collected there on cars entering and leaving Ohio. No tolls, whatsoever, have ever been collected in the State of West Virginia.

The bridge carries an equal volume of traffic southbound from Ohio and northbound from West Virginia. It has only one entrance or exit in each state, and has no facilities for intrastate traffic. All of the traffic across the bridge, therefore, is necessarily involved in interstate commerce. That the bridge constitutes an important factor in interstate commerce is evidenced by the fact that it is the only bridge spanning the Ohio River between Shippingport, Pennsylvania, and Weirton, West Virginia.

The Petitioner has always maintained the position that all of the income derived from collection of these interstate

bridge tolls is exempt from the West Virginia Business and Occupation Tax. Heretofore the State Tax Commissioner has acquiesced in this view. In 1939, Ernest K. James, the then State Tax Commissioner, accepted the Petitioner's view that all receipts from the interstate bridge tolls should be exempt from the Gross Sales Tax, the predecessor to the present Business and Occupation Tax. A copy of Commissioner James' letter of acquiescence dated October 26, 1939, is attached as Exhibit "B". In 1966, Mr. J. B. Camilli, Deputy Tax Commissioner, requested Paul R. Goode, Jr., Director of the Business and Occupation Tax Division, to collect the Business and Occupation Tax from the Petitioner for the years 1961 through 1965. A round of correspondence followed, culminating in Petitioner's December 28, 1966, letter outlining Petitioner's reasons for continuing to claim an exemption from tax for the interstate bridge tolls. No further response to this letter was ever received, the Commissioner apparently having agreed with Petitioner's longstanding claim of exemption. A copy of Petitioner's letter, designated as Exhibit "C", is also attached to this petition.

It must be noted that not only has the Tax Commissioner now attempted to reverse the well-settled position taken by his predecessors, but the Business and Occupation Tax has arbitrarily and unreasonably been assessed against Petitioner's entire gross income. Since at most one-half of the interstate bridge traffic can be allocated to West Virginia, no more than half of Petitioner's gross income can even be asserted to be subject to the instant tax.

• • •

C. ***The Business and Occupation Tax may not be assessed against Petitioner's gross income derived from its interstate commerce activities due to the express prohibition of Article 13, as well as its past judicial construction.***

The only provisions of Article 13 which might possibly be applicable to the business activities of the Newell Bridge and Railway Company are Sections 11-13-2d and 11-13-2i. Section 11-13-2d states:

> Upon any person engaging or continuing within the state in any public service...there is...hereby levied and shall be collected, taxes on account of the business engaged in equal to the gross income of the business multiplied by the respective rates: ...toll bridge companies, 4.29 percent....

This Section, however, goes on specifically to state:

> The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States, or between this state and foreign countries.

Since all of the gross income of the business of the Newell Bridge and Railway Company is derived from commerce between the States of West Virginia and Ohio, it is clear that none of this income from interstate commerce was intended to be taxed by this provision of the statute. Accordingly, all of such income has been consistently claimed as exempt from taxation on the company's annual returns for the Business and Occupation Tax and its predecessor, the Gross Sales Tax, for at least forty years.

The only other provision of Article 13 which might be applicable is Section 11-13-2i. That Section states:

> Upon every person engaging or continuing within this state in the business of furnishing any real or tangible personal property, which has a tax situs in this state, or any interest therein for hire, loan, lease or otherwise, whether the return be in the form of rentals, royalties, fees or otherwise, the tax shall be 1.15% of the gross income of such activity.

While it is uncontested that two-thirds of the bridge has a "tax situs" within the State of West Virginia, it is asserted that this provision is also inapplicable to the instant situation as a matter of judicial construction of the statute.

Although Section 11-13-2i, unlike Section 11-13-2d, does not specifically provide that income derived from interstate commerce shall not be included in the computation of the tax, the courts of West Virginia have construed this provision of the statute in a similar fashion. Since the company's entire income is derived from collection of tolls in Ohio, any tax imposed under Section 11-13-2i would have to be based upon taxation of this out-of-state activity. In the case of *James vs. Dravo Contracting Co.*, 302 U.S. 134, 82 L.Ed. 155, 58 S.Ct. 258 (1937), it was held that the State of West Virginia under Article 13 of Chapter 11 of the West Virginia Code had no power to impose a Gross Sales Tax unless the activities which were the subject of the tax were carried on within the territorial limits of the state. In the case of *American Barge Lines vs. Koontz,* 136 W.Va. 737, 68 S.E.2d 56 (1951), moreover, it was held that West Virginia had no right to impose a privilege tax under Article 13 on an apportioned percentage of gross income from interstate transportation since this would constitute an unreasonable burden upon interstate commerce.

D. *Imposition of the Business and Occupation Tax upon the Petitioner's gross income derived from interstate commerce creates an undue burden on interstate commerce, and is thus unconstitutional.*

The foregoing interpretation of the applicability of Article 13 conforms to generally recognized constitutional principles. The general rule is that the power to levy an excise, such as the instant Business Occupation Tax, upon the performance of an act or the engaging in an occupation does not depend upon the domicile of the person subject to the excise,

nor upon the physical location of the property used in connection with the act or Occupation Tax, but depends upon the place which the act is performed or occupation engaged in. *Provident Savings Life Assurance Society vs. Kentucky,* 239 U.S. 103, 60 L.Ed. 167, 36 S.Ct. 34 (1915). A state may constitutionally tax the performance of a certain act within its limits provided the act which is subject to the tax is performed within the state. *Wisconsin vs. J. C. Penney Co.,* 311 U.S. 435, 312 U.S. 712, 85 L.Ed. 267, 1143; 61 S.Ct. 246, 444 (1940). As a state may not lay a privilege or excise tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed, *Great Atlantic and Pacific Tea Co. vs. Grosjean,* 301 U.S. 412, 302 U.S. 772, 81 L.Ed. 1193, 82 L.Ed. 599, 57 S.Ct. 772, 58 S.Ct. 3 (1937), it cannot constitutionally impose an excise upon the performance of an act outside the limits of the governmental unit by which the exercise is levied. *Provident Savings Life Assurance Society v. Kentucky, supra; see also, Matson Navigation Co. vs. State Board of Equalization,* 297 U.S. 441, 80 L.Ed. 791, 56 S.Ct. 553 (1936). West Virginia thus lacks the constitutional power to impose a privilege tax on the Petitioner's activity of collecting tolls in Ohio.

There are even broader constitutional principles appliable to any attempt to impose a privilege tax such as the instant Business and Occupation Tax upon the gross business income of the company derived from its toll collecting activities in Ohio. Since the entire gross income upon which this tax would be based is derived from interstate bridge tolls, this is a tax imposed upon activity which is exclusively interstate commerce. A privilege tax on business—which is exclusively interstate violates the commerce clause, Article 1, Section 8 of the United States Constitution as an undue burden on interstate commerce. *Spector Motor Service, Inc. vs. O'Connor,* 340 U.S. 602, 95 L.Ed. 573, 71 S. Ct. 508 (1951).

The general rule is that a state cannot impose a tax upon the business or privilege of engaging in interstate or foreign commerce, and that a state excise, privilege, or occupation tax is therefore invalid insofar as the incidence thereof falls directly upon such commerce. *Dixie Ohio Express Co. vs. State Revenue Commission*, 306 U.S. 702, 83 L.Ed. 495, 59 S.Ct. 435 (1939). The logic behind this principle is obvious. Any tax upon activity which is exclusively interstate commerce, when it is passed on by the taxpaying entity, necessarily falls upon the interstate commerce activities itself or upon those individuals involved in it. In the instant case, were the Newell Bridge and Railway Company required to pay the West Virginia Business and Occupation Tax upon gross income derived from interstate bridge tolls, this additional cost would immediately be passed on in the form of higher tolls. The burden on interstate commerce, consequently, would be clear and direct. It has been expressly held, moreover, consistent with this analysis, that taxation of a corporation engaged solely in the activity of operating an interstate bridge would be invalid as an interference with interstate commerce. *Gloucester Ferry Co. vs. Pennsylvania*, 114 U.S. 196, 29 L.Ed. 158, 5 S.Ct. 826 (1885).

If it be argued that the business activity of the Newell Bridge and Railway Company is not exclusively interstate commerce, but rather that the maintenance activities required to be performed on the two-thirds of the bridge located within the boundaries of the State of West Virginia constitutes additional *intra*state activity, there is still no constitutionally permissible way in which the Business and Occupation Tax may be levied on the company's gross income. It is true that state taxes on gross receipts of a transportation company with both interstate and intrastate activity may be valid as to the portion representing intrastate business, *New York ex rel. Cornell S. B. Company vs. Sohmer*, 235 U.S. 549, 59 L.Ed. 355, 35 Sup. 162 (1915), if

amounts representing such business can be separated from the total receipts. *Pacific Teleph. and Teleg. Company vs. Tax Commissioner*, 297 U.S. 403, 80 L.Ed. 760, 56 S.Ct. 522 (1936). Assuming, *arguendo*, that the petitioner were engaged in both interstate as well as intrastate business activity, any tax imposed would have to be fairly apportioned between the taxpayer's business done within and without the state. *Interstate Pipeline Company vs. Stone*, 337 U.S. 662, 669 (1949); *see also, International Harvester Company vs. Evatt*, 329 U.S. 416 (1947). In the instant case, however, no apportionment whatsoever is possible. All of the gross income, as has been noted, is derived from interstate activities.

Nor can it be argued, furthermore, that because the maintenance of the two-thirds of the bridge within the State of West Virginia indirectly contributes to the collection of the tolls in Ohio that a portion of Petitioner's gross income should be allocated to the State of West Virginia for the purpose of computing the Business and Occupation Tax. A tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, i.e., the flow of commerce, that it cannot be realistically separated from it. *Michigan-Wisc. Pipeline Company vs. Calvert*, 347 U.S. 157 (1953); *Memphis National Gas Company vs. Stone*, 335 U.S. 80, 87 (1948); *Western Livestock vs. Bureau of Revenue*, 303 U.S. 250, 258 (1938). The rationale behind this view is again obvious. If a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that the other states through which the commerce passes or into which it flows, can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening interstate commerce. *Michigan-Wisc. Pipeline Company vs. Calvert, supra*, at 166. In this case, were West Virginia allowed to impose a business occupation tax upon

the gross income derived from the interstate bridge tolls, the State of Ohio would have an incentive for doing likewise.

The business activity here involved cannot realistically be separated into local, that is intrastate, and interstate activity due to the fact that the activities of the Petitioner are intimately and inextricably involved with the interstate traffic crossing the bridge. Since all of the Petitioner's income is derived from the tolls which it collects from the bridge traffic, any tax imposed upon its revenue necessarily must affect that activity. Petitioner has no other operations, either intrastate or interstate which could bear the burden of this tax. The imposition of the West Virginia Business and Occupation Tax, therefore, would inevitably constitute a direct burden upon interstate commerce.

The Petitioner is aware of the position taken in certain cases, *Henderson Bridge Company vs. Henderson*, 146 U.S. 679, 35 L.Ed. 900, 12 S. Ct. 114 (1891); *Detroit International Bridge Co. vs. Corporation Tax Appeal Board*, 294 U.S. 83, 79 L.Ed. 777, 55 S. Ct. 333 (1935); that the maintenance and operation of a bridge across a state or national boundary does not constitute interstate commerce at all, and that consequently state taxation of the business or corporation maintaining or operating it is not invalid under the commerce clause. The view taken in these cases is the dubious one that it is the passengers traversing the bridge, rather than the company operating and maintaining it, that are engaging in interstate commerce, and that consequently any tax imposed upon the bridge company creates only an indirect burden on interstate commerce. It is, of course, true that a state excise tax which effects interstate commerce not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating the rights under the commerce clause. *Hump Hairpin Manufacturing Company vs. Emmerson*, 258

U.S. 290, 66 L.Ed. 622, 42 Sup. 305. The *Henderson* and *Detroit Bridge* cases, it is asserted, however, are not proper authority for the imposition of the Business and Occupation Tax in the instant case. The *Detroit International Bridge* case involved a capital stock tax levied by the State of Michigan on a corporation which operated an international bridge. The *Henderson* case, on the other hand, involved a tax by the State of Kentucky on the value of the corporate franchise of a corporation which operated an interstate bridge. The court in that case concluded that "the tax in question was nothing more than a tax on the tangible property of the company in Kentucky." These taxes can be likened to the West Virginia property and income taxes, both of which the Petitioner pays and which are not in issue here.

There is ample authority contrary to the view taken in *Henderson* and in *Detroit International Bridge*. In the case of *Covington and C. Bridge Company vs. Commonwealth of Kentucky*, 154 U.S. 204, 14 S. Ct. 1087 (1894), the validity of an act of the legislature of Kentucky regulating the rate of tolls to be charged for traffic over a bridge between Covington, Kentucky, and Cincinnati, Ohio, was considered. In the course of the opinion the court stated:

> This case involves the right of one state to fix charges for the transportation of persons and property over a bridge connecting it with another state, without the assent of Congress or such other state, and thus involving the further inquiries—first, whether such traffic across the river is interstate commerce; and second, whether a bridge can be considered an instrument of such commerce.

Both of these questions were answered in the affirmative on the authority of *Gloucester Ferry Co. vs. State of Pennsylvania, supra*, and *Wabash, St. Louis and Pacific Railway Company vs. People of Illinois*, 118 U.S. 557, 7 S. Ct. 4 (1886). These cases were held to be directly in point.

There is even stronger authority for the proposition that the view taken in *Henderson* and *Detroit International Bridge* has since been rejected by the Supreme Court. In the case of *Walling v. Patton-Tulley Transp. Co.*, 134 F.2d 945 (1943), the court cited the earlier doctrine of *Pedersen vs. D. L. & W. R.R. Co.*, 229 U.S. 146, 33 S. Ct. 648, 57 L.Ed. 125 (1913), in stating that the work of keeping tracks and bridges used by interstate commerce in a proper state of repair is so closely related to interstate commerce as to be, in practice and legal contemplation, a part of interstate commerce. All doubts about *Pedersen*, the court went on, had been "completely dispelled" by the Supreme Court's decision in *Overstreet vs. North Shore Corporation*, 318 U.S. 131 (1943). In that case, decided subsequent to *Detroit International Bridge*, the Supreme Court held that the operator of a bridge across an intercoastal waterway used extensively by interstate commerce was "engaged in interstate commerce" within the meaning of the Fair Labor Standards Act. The court discussed the view taken in *Henderson* and *Detroit International Bridge* and expressly declined to follow it.

The most recent analysis of whether the maintenance and operation of an interstate bridge constitutes interstate commerce is found in *National Association of Motor Bus Owners vs. Brinegar*, 483 F. 2d 1294 (1973). The court in that case first cited *Overstreet:*

> Vehicular roads and bridges are . . . indispensable to the interstate movement of persons and goods [and] if they are used by persons and goods passing between the various states, they are instrumentalities of interstate commerce. [Accordingly] those persons who are engaged in maintaining and repairing such facilities should be considered as 'engaged in commerce' and so also should 'operational employees whose work is just as closely related to the interstate movement'.

The court then applied its own analysis, noting that the test of involvement in interstate commerce is a practical one of the relationship to commerce.

> Like the intrastate bus driver, neither the road maintainer, *the toll gatherer,* nor the drawbridge operator is himself making an interstate trip, but each performs a function in which a potential impact upon interstate traffic inheres. The vital inquiry in these cases 'is not whether the ... activities effect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it'. [citing *McLeod v. Threlkeld,* 319 U.S. 491, 497; 635 Ct. 1248, 1251; 87 L.Ed. 1538 (1943)]. (emphasis added).

In summary, then, it is clear that a Business and Occupation Tax may not be levied on the business activities of the Petitioner under Article 13 of Chapter 11 of the West Virginia Code. First, Section 11-13-2d expressly states that gross income derived from interstate activities is not to be included in the computation of the tax. Section 11-13-2i has been construed by the courts to the same effect. Since all of the gross income which may be the basis of any tax is derived from interstate commerce, there is no income left upon which any tax may be based. Second, even if it be asserted that a portion of this gross income derived from interstate commerce should be allocated to West Virginia, the imposition of the tax on this basis would, nevertheless, constitute an undue burden on interstate commerce.

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F. *Conclusion*

For the foregoing reasons the assessment dated January 22, 1974, should be vacated in its entirety.

February 19, 1974 (Signature omitted)

(Exhibits not printed)

STIPULATION OF FACTS

Entered at Administrative Hearing, April 11, 1974

1. The Petitioner, Newell Bridge & Railway Company, is a West Virginia Corporation having its principal office in Newell, Hancock County, West Virginia.

2. The sole business of the Petitioner is the operation of a toll bridge across the Ohio River between Newell, West Virginia and East Liverpool, Ohio.

3. The bridge is physically located two-thirds within the state of West Virginia, one-third within the state of Ohio.

4. The bridge has been operated as a toll facility continuously since 1905.

5. The toll house where all tolls are collected is and always has been located in the state of Ohio.

6. The volume of traffic in each direction across the bridge is approximately equal.

7. Prior to February 1, 1970 tolls were collected in Ohio from cars leaving the state of Ohio and also from vehicles entering Ohio.

8. Since February 1, 1970, tolls have been collected only from vehicles leaving the state of Ohio. Traffic leaving West Virginia entering the state of Ohio passes toll-free.

9. At no time has the bridge toll house ever been located within the state of West Virginia.

10. The bridge has only one entrance or exit in each state and has no facilities for carrying intrastate traffic.

11. All traffic on the bridge is interstate traffic.

12. Prior to May 14, 1969, the bridge was in direct competition with the bridge between the City of Chester, West Virginia, and East Liverpool, Ohio, located approxi-

mately one mile up river. The Chester Bridge, owned and operated by the state of Ohio was originally a toll facility but for more than twenty years prior to its closing was a free bridge.

13. While the Chester Bridge was a toll facility owned and operated by the state of Ohio, the state of West Virginia imposed no tax whatever on said bridge.

14. Since the closing of the Chester Bridge May 14, 1969, the nearest bridges across the Ohio River are located at Shippingport, Pennsylvania and Weirton, West Virginia and are both toll-free facilities.

15. The state of West Virginia is presently constructing a bridge between the City of Chester, West Virginia and East Liverpool, Ohio, which bridge is expected to be in operation in 1976 as a toll-free facility.

16. Petitioner has always filed returns and paid taxes as required by the state of West Virginia on its property and capital stock based upon its property in the state of West Virginia. It has also paid all income taxes levied upon it as a domestic West Virginia corporation.

17. Petitioner has for each and every year at least since 1933 filed a return for the West Virginia Business and Occupation Tax and its predecessor tax, the Gross Sales Tax, and for each and every such year has reported the entire amount of the tolls collected on the bridge as exempt from taxation by reason of the fact that they were interstate tolls. The exemption has been claimed continuously for more than forty years.

18. On April 24, 1939, at File #15-681, the State Tax Commissioner asserted the right to impose the Gross Sales Tax on the interstate toll receipts of Petitioner for the years 1934 through 1938, which claim was finally withdrawn on October 26, 1939. Attached hereto as Exhibits 1 through 7 is

the relevant correspondence between the Company and the State Tax Commissioner in that proceeding.

19. No further action was taken by the Office of the State Tax Commissioner for a period of twenty-seven (27) years.

20. On October 4, 1966, the Office of the State Tax Commissioner, acting through Paul R. Goode, Jr., Director of Business and Occupation Tax Division, at File #14-400-098-626-15-B, again initiated proceedings to assert the right of the state of West Virginia to collect business and occupation tax on the interstate tolls of Petitioner. Petitioner's letter to the State Tax Commissioner, dated December 28, 1966, reasserting Petitioner's position that the entire amount of such tolls were exempt as interstate commerce was accepted by the State Tax Commissioner without response. True and correct copies of the memorandum and correspondence in the 1966 proceedings are attached hereto as Exhibits 8 through 11 inclusive.

21. No further action was taken by the State Tax commissioner for a period of six and one-half years until August 10, 1973, when Carl A. Keefel, Tax Examiner of the Auditing Section of the Business and Occupation Tax Division, appeared at the office of Petitioner in Newell, West Virginia and initiated the proceedings which are the subject of this Protest.

23. The Tax Commissioner's notice of assessment dated January 22, 1974 was served on Petitioner January 30, 1974.

24. The Petitioner's petition for reassessment was timely filed on February 21, 1974.

(Exhibits not printed)

TAXPAYER'S NOTICE OF APPEAL TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Pursuant to the provisions of Chapter 11, Article 13, Section 8, of the Code of West Virginia of 1931, as amended, plaintiff Newell Bridge & Railway Company, a West Virginia corporation, hereby gives notice to the Tax Commissioner of West Virginia of its appeal from the decision of the Tax Commissioner upon the plaintiff's petition for reassessment of business and occupation tax, filed pursuant to an assessment made by the Tax Commissioner dated January 22, 1974, and alleges in support thereof as follows:

1. Under date of January 22, 1974, defendant Richard L. Dailey, issued an assessment against plaintiff for business and occupation tax stated in the assessment to be for the years 1968 through 1972, inclusive, in the amount of $83,051.25 and penalties in the amount of $24,306.97. Within the time provided by law, plaintiff filed with defendant a petition for reassessment of such business and occupation tax and penalty objecting to each item of the assessment. Thereafter, on April 11, 1974, a hearing was held upon such petition, and, under date of December 8, 1975, defendant issued his "Administrative Decision" affirming his original assessment of business and occupation tax in the amount of $83,051.25 and determining that plaintiff showed reasonable cause for waiver of penalty and thereby waiving the penalty of $24,306.97. Said "Administrative Decision" was received by plaintiff on December 15, 1975.

2. Plaintiff alleges that the aforesaid assessment made by defendant, and the $83,051.25 of business and occupation tax determined to be due from plaintiff by defendant in his "Administrative Decision" is excessive and erroneous, and alleges in support thereof as follows:

(a) Plaintiff is not subject to the West Virginia business and occupation tax on the gross income from the operation of its interstate toll bridge across the Ohio River.

(b) Defendant erroneously included in the measure of the business and occupation tax assessed against plaintiff gross income derived from commerce between this state and other states when such gross income is specifically excluded from the measure of the tax by Chapter 11, Article 13, Section 2d of the Code of West Virginia.

(c) Defendant erroneously included in the measure of the business and occupation tax assessed against the plaintiff gross income derived from interstate commerce, the taxation of which creates an undue burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

WHEREFORE, plaintiff respectfully prays that the Court will review the decision and determination of the Tax Commissioner and grant the plaintiff relief therefrom.

Filed January 7, 1976 (Signature omitted)

TAX COMMISSIONER'S ANSWER IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Richard L. Dailey, Tax Commissioner of the State of West Virginia, and defendant herein, for answer to plaintiff's petition for appeal filed in this cause, replies as follows:

1. In response to paragraph 1. of plaintiff's petition, defendant admits all the allegations contained therein;

• • •

2. In response to paragraph 2., and subparagraphs 2.(a), 2.(b), and 2.(c) of plaintiff's petition, defendant denies all the allegations contained therein.

3. In further response to plaintiff's petition, defendant states that:

A. For the years 1968 through 1972, plaintiff's gross receipts derived from toll bridge operations and charges are subject to the West Virginia Business and Occupation Tax under Sections 2d and 2i, of Article 13, of Chapter 11, of the West Virginia Code of 1931, as amended.

B. For those years, plaintiff was engaged in the business of providing a toll bridge and was not engaged in any interstate commerce.

WHEREFORE, defendant prays that this cause be denied and dismissed; that the Administrative Decision dated December 8, 1975, of the defendant Richard L. Dailey, State Tax Commissioner of West Virginia, holding plaintiff indebted to the State of West Virginia in the amount of $83,051.25 be affirmed in all respects; and that the Court render its judgment and decree requiring plaintiff to pay defendant the sum of $83,051.25, plus interest and costs expended by defendant in defending this action, and that defendant be granted such other and further relief as he may in law and equity be entitled to.

Filed March 18, 1976 (Signature omitted)

TAX COMMISSIONER'S PETITION FOR APPEAL TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Your petitioner, David C. Hardesty, Jr., Tax Commissioner of the State of West Virginia, respectfully represents that he is aggrieved by a judgment and final order made and entered by the Circuit Court of Kanawha County, West Virginia, on the 5th day of October, 1977, in the above-entitled action wherein The Newell Bridge & Railway Company, a corporation, was plaintiff, and Richard L. Dailey, then Tax Commissioner of the State of West Virginia, was defendant. In said final order, the Circuit Court of Kanawha County set aside the deficiency assessment of business and occupation tax for the period 1968 through 1972 for tax in the amount of Eighty-Three-Thousand-Fifty-One Dollars and Twenty-Five Cents ($83,051.25) which had been affirmed in an Administrative Decision issued by the State Tax Commissioner against The Newell Bridge & Railway Company on December 8, 1975.

The original record, including the written opinion of the Court below, duly arranged and certified, is presented herewith.

• • •

ASSIGNMENT OF ERRORS

Petitioner, David C. Hardesty, Jr., State Tax Commissioner, assigns the following errors committed to his prejudice by the Circuit Court of Kanawha County:

1. The Court erred in entering its judgment on October 5, 1977, vacating the deficiency tax assessment issued by the defendant below, State Tax Commissioner, in the amount of $83,051.25, and exonerating plaintiff below, The Newell Bridge & Railway Company, a corporation, from the payment thereof.

2. In its judgment and ruling of October 5, 1977, the Court erred as a matter of law in not ruling that a toll bridge between two states is not itself engaged in interstate commerce by the mere collection of tolls from motor vehicles traveling over the bridge.

3. In its judgment and ruling of October 5, 1977, the Court erred as a matter of law in finding and ruling that the business of the plaintiff below, taxpayer, in operating a toll bridge between Newell, Hancock County, West Virginia, and East Liverpool, Ohio, is interstate commerce.

4. In its judgment and ruling of October 5, 1977, the Court erred as a matter of law in finding and ruling that the gross income of the plaintiff below, taxpayer, from its business of operating an interstate toll bridge is excluded from the business and occupation tax under the express language of Chapter 11, Article 13, Section 2d of the Code of West Virginia.

5. In its judgment and ruling of October 5, 1977, the Court erred as a matter of law in ruling that no business and occupation tax is due to the State of West Virginia for the tax periods 1968 through 1972.

6. In its judgment and ruling of October 5, 1977, the Court erred as a matter of law in failing to find and rule that the taxpayer, basing its appeal on a multiple or cumulative tax burden claim under the Commerce Clause of the United States Constitution had failed in its burden of proof to show that it has been, in fact, taxed on the same income by two or more states.

7. In its judgment and ruling of October 5, 1977, the Court erred as a matter of law in not ruling that the taxpayer-plaintiff had failed to show that it had, in fact, been taxed on the same income by two or more states,

inasmuch as the taxpayer was basing its appeal on a multiple or cumulative tax burden claim under the Commerce Clause of the United States Constitution.

WHEREFORE, David C. Hardesty, Jr., State Tax Commissioner, Appellant, Defendant Below, respectfully requests this Honorable Court to review this petition for appeal so that the action of the Circuit Court of Kanawha County may be reviewed and reversed.

(Signatures omitted)

RELEVANT DOCKET ENTRIES

Before the Tax Commissioner of West Virginia
Docket No. 74-075B

February 21, 1974	Taxpayer's Petition for Reassessment filed.
April 11, 1974	Administrative hearing held by Tax Commissioner of West Virginia.
December 8, 1975	Administrative Decision entered by Tax Commissioner of West Virginia affirming assessment and setting aside penalty.

In the
Circuit Court of Kanawha County,
West Virginia at Civil Action
Docket No. AP-CA-76-9

January 7, 1976	Order allowing Notice of Appeal by Taxpayer to be filed.
October 5, 1977	Order and Judgment, Thomas E. McHugh, Judge, reversing decision of Tax Commissioner and vacating assessment.

In the Supreme Court of Appeals
of West Virginia at Docket No. 14250

June 5, 1978	Petition for Appeal to the Supreme Court of Appeals of West Virginia filed by Tax Commissioner.
September 11, 1978	Appeal granted.
May 20, 1980	Opinion and Order reversing the decision of the Circuit Court of Kanawha County, West Virginia.
June 17, 1980	Taxpayer's Petition for Rehearing filed.
July 2, 1980	Order denying Petition for Rehearing.